

Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). "When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the scope of relevance as defined under Fed. R. Civ. P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by the discovery would outweigh the ordinary presumption in favor of broad disclosure." *General Electric Capital Corp. v. Learn Corp.*, 215 F.R.D. 637, 640 (D. Kan. 2003). The Supreme Court interprets relevancy in the discovery context "broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc., v. Sanders*, 98 S. Ct. 2380, 2389 (1978). The discovery regarding financial information sought by the State is clearly relevant to the punitive damages claims in this case, and the George's Defendants' fail to establish good cause for a protective order for that information.

See Ex. A (December 24, 2008 email from Graves). Nevertheless, the State attempted to contact counsel for George's again via telephone in late January to discuss the issues contained herein and their January 5, 2009 production of materials that Mr. Payne was not able to review prior to filing his report that was due the same day these materials were produced to the State. Counsel for the George's Defendants was unavailable to talk, then out of the office, then never responded to emails from the State's counsel about selecting a time for a call. *See* Ex. B. Ironically, the George's Defendants never attempted to meet and confer with the State regarding their motion for a protective order and they fail to certify that they did so in their motion. Thus, if any motion should not be considered, it should be the George's Defendants' motion for protective order.

One of the seven factors for a jury to consider in evaluating punitive damages under Oklahoma law is “[t]he financial *condition* of the defendant.” See 23 Okla. Stat. § 9.1 (emphasis added). This Court has repeatedly held that discovery regarding a defendant’s financial condition and net worth is appropriate when a claim for punitive damages has been made. In the *City of Tulsa* case, this Court held that “[i]t would appear that *financial statements* reflecting the Defendants’ net worth from 1996 forward would be sufficient for the Plaintiffs’ needs. . . . This order is without prejudice to Plaintiffs’ re-urging the motion *should additional financial information be necessary* as the case progresses.”

The George’s Defendants claim they have provided more financial information to the State than is entitled to receive. See Motion, p. 6. However, even if the Court were to accept the narrow proposition that balance sheets are the only financial information discoverable by the State, the materials produced by the George’s Defendants’ are revised and redacted balance sheets that George’s management created specifically for production in this case. Their redacted balance sheets are not the actual balance sheets maintained by the company in the normal course of business, and important information was removed from these revised sheets before they were produced. If the George’s Defendants had acted consistently with the position they take in their motion, then they should have produced their complete balance sheets, as maintained in the ordinary course of business, with their initial responses to the requests for production. Instead, they produced substantially redacted and revised balance sheets created specifically for litigation just weeks before the expert damages deadline. See State’s Motion to Compel,

Ex. E (revised and redacted balance sheets produced by George's and submitted to the Court *in camera*).

The Statements of Income produced by the George's Defendants' on January 5, 2009 each included the same disclosure from the accounting firm regarding redactions and diversions from Generally Accepted Accounting Principals. Thus, it is evident that these sheets are likewise missing important information integral to understanding the information set forth therein.

The George's Defendants' attempt to discredit the plain language of the disclaimer which precedes each of the revised and redacted balance sheets provided to the State. These disclaimers make it abundantly clear that substantive information in the documents was removed. The affidavit of the George's accountant actually *supports* the State's argument that important information from the balance sheets has been redacted. The affidavit explains that the disclaimer at the beginning of these items was required according to Generally Accepted Accounting Principals because "[t]o omit that information is defined as a *GAAP departure*." See Motion, Ex. E at ¶ 6. In other words, the George's Defendants deviated from the generally accepted method of presenting financial information and thus their accounting firm was required to explain this departure. The affidavit makes a futile attempt to minimize the information removed from the balance sheets as follows: "The omitted notes to financial statements merely include a description of the company's accounting policies, as well as more detailed information about the larger line items reported in the Balance Sheet or Income Statement." See *id.* at ¶ 7. Obviously, the accounting policies used to create the balance sheets are important information to have when attempting to understand the information

presented in the balance sheets, as is the additional factual information about significant line items.

The George's Defendants could have made this entire production much easier on themselves, the State, and the Court by simply producing the complete balance sheets, as they are maintained in the ordinary course of business, with the corresponding integral notes, and designating them as confidential documents. Instead, they had their accountants create new, revised and redacted documents for production, which deviated from Generally Accepted Accounting Principals and omitted important information.

The George's Defendants attempt to argue that the State should have filed its motion to compel earlier (Motion, p. 11-12), yet in the same motion they also argue that the State is not entitled to the information it seeks until *after* it proves a prima facie case for punitive damages (Motion, p. 2). The George's Defendants advanced the position that it was too early in the case to provide financial information even in October of 2008, as the expert report damages approached. *See* Ex. C (Graves Oct. 31, 2008 letter to Ward)("there has been no support in the record to presume *at this stage of the case* that production of its confidential financial information is appropriate")(emphasis added). Anticipating that Defendants would take the commonly held position that a plaintiff is not entitled to financial information until punitive damages are at issue in the case, and recognizing that the financial condition of companies changes over time, the State determined the most prudent course of action was to pursue financial information when it was time to prepare for the damages expert deadline. Had the State asked for this information a year earlier, Defendants inevitably would have argued even more strongly that the request was premature, and the State would have had to then pursue updated

information again late in 2008. Thus, the State approached the Defendants about this outstanding discovery in October 2008 in anticipation of the January 2009 expert damages deadline. Inexplicably, even at that time, the George's Defendants objected to the timing of the request as premature.

Finally, the Georges' Defendants claim that the State is seeking the materials for an improper purpose of bolstering its punitive damages expert report. The State certainly made efforts, through the lengthy correspondence process with counsel, to resolve this conflict prior to the deadline for the damages reports, but counsel for George's did not produce one set of material to the State until the same date the reports were due, January 5, 2009 and completely refused to produce information pertaining to cash flow and tax returns. *See* Ex. A. Obviously, the State had hoped that the materials counsel were producing would have arrived sooner, and would have been complete. But they were not, and counsel has been nonresponsive since that time.

Finally, The George's Defendants have put the cart before the horse by arguing against any supplementation of Mr. Payne's report. First, the instant dispute about the discoverability of the financial information must be addressed. If the Court compels production of additional financial information, then Mr. Payne will have to review that information. Once he reviews the information, *if* he determines that a supplement to his report is appropriate because the information previously provided by Defendants was incomplete or inaccurate, then the State will seek leave from this Court for such a supplement. However, unless or until those steps occur, the State does not know whether seeking leave for a supplement to Mr. Payne's report would be appropriate. Thus, whether or not a supplement from Mr. Payne is appropriate is an issue for another day.

Moreover, whether or not this Court will allow supplementation of Mr. Payne's report, the State is entitled to the information sought in order to rebut any expert designated by the George's Defendants regarding financial condition or to adequately cross examine the George's Defendants' corporate witnesses regarding its financial condition. Mr. Payne is not the only vehicle for presenting evidence of financial condition of any given defendant to a jury.

For the reasons stated herein, the Court should deny the George's Defendants' motion for protection and order the George's Defendants' to respond to the State's requests for information pertaining to its financial condition and to provide the specific documents requested in the State's motion to compel (Dkt. # 1867).

Respectfully Submitted,

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